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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

WARREN J. ADAMS, AND TEXAS SCHOOL OF PRACTICAL NURSING, INC., *Petitioners*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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v.

UNITED STATES OF AMERICA

Respondent.

PETITIONERS' REPLY BRIEF

AMENDMENT TO STATEMENT OF STATUTES INVOLVED

The petition for certiorari herein erroneously refers, in its statement of "Statutes Involved," to Section 15(a) of the Federal Trade Commission Act, 29 U. S. C. § 55(a). The reference should have been to Section 5(a)(1) of the Act, 29 U. S. C. § 45(a)(1), which reads as follows:

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

ARGUMENT

I. THE STATEMENT OF FACTS IN THE GOVERNMENT'S BRIEF IN OPPOSITION OMITS THE ESSENTIAL ELEMENTS OF THE CASE.

If deliberate concealment of material facts constitutes "fraud," as the indictment in this case alleged, then the Government's Brief in Opposition might equally be regarded as fraudulent. By carefully omitting any reference to certain critical elements of the case, the Government's brief gives the entirely false impression that this is simply a routine case of mail fraud, in which the defendants were charged and convicted of nothing more than an effort to bilk the public through simple misrepresentations of objective facts. The Government's brief catalogs numerous misrepresentations which it claims the defendants made, but all of them fall into the following categories:

1) misrepresentations concerning the eligibility of the Texas School's graduates for a state license,

2) misrepresentations concerning the employment service provided by the School to its graduates,

3) misrepresentations concerning the type of instruction given to students who came to Dallas for the two weeks of classroom instruction offered to those who completed the correspondence portion of the course, and

4) misrepresentations concerning the type of employment which would be available to graduates of the course.

If this case involved nothing more than allegations and proof of a scheme to defraud involving these kinds of misrepresentations, then probably it would not be worthy of this Court's attention. But what the Government fails to mention in its brief is the fact that under the indictment and

the charge to the jury, the prosecution was not required to prove any of the misrepresentations of objective facts which are listed in the Government's brief. The jury was authorized to convict the defendants on all counts even if it found that they had made none of these misrepresentations. That is why this case is now before this Court.

As we pointed out in the petition, the case against these defendants did not rest solely, or even primarily, on allegations and proof of outright misrepresentation of objective facts, such as those dwelt on at such length in the Government's brief. Of the eight misrepresentations alleged in the indictment to constitute the defendants' "scheme and artifice to defraud," four dealt entirely with the quality and effectiveness (as distinguished from the nature) of the course of instruction offered by the defendants. These alleged "misrepresentations" were:

> "(a) that persons who completed the aforesaid course of instruction would be highly trained and well qualified practical nurses;
>
> * * *
>
> "(c) that persons completing the said course of instruction would be eligible for hospital employment in the direct attendance of the sick;
>
> "(d) that persons completing the said course would be qualified to give bedside care of the sick and carry out treatments under instructions of medical doctors;
>
> "(e) that the defendants maintain the highest of standards in facilities, staff, and personnel, and in the quality of instruction;"

The Government sought to prove that these were misrepresentations by introducing the opinion testimony of expert witnesses to the effect that practical nursing could not be taught through a correspondence course, but only through actual clinical training. These witnesses, except in one tri-

fling instance (R. 470-71), did not find any fault with quality, coverage or adequacy of the materials contained in the defendants' course. They testified that in their opinion *no* correspondence course was of value in the training of practical nurses. (R. 345, 360-63, 372, 404-08, 459-63.) *Ergo*, the Government contended, the representations made by the defendants were false.

The defense introduced the opinion testimony of other equally qualified experts who testified to the contrary. (R. 754-65, 797-807, 830-50, 927-43). One was a physician who had trained medical corpsmen in the army using a similar, but "more brief" course. (R. 927-43). But if the jury believed the Government's experts, and disbelieved the defendants', it would naturally conclude that the graduates of the defendants' course would not be "well qualified practical nurses," that they would not be "eligible for hospital employment" or "qualified to give bedside care of the sick," and that the defendants did not maintain "the highest standards . . . in the quality of instruction." And these findings, in themselves, would have been a sufficient basis for convicting the defendants on *all counts of the indictment,* even if the jury found that the defendants were not guilty of any other misrepresentations. As the trial judge charged the jury:

> "It is not necessary or essential for the government to prove in this case every element or part of the scheme to defraud alleged in the indictment, but conviction may be had upon proof of sufficient elements or parts so alleged which are adequate to constitute a scheme to defraud." (R. 1376)

In other words, under the indictment, the evidence, and the trial judge's charge, the jury was entitled to convict these defendants solely on the basis of a finding that by the very act of offering a correspondence course in practical nursing they were perpetrating a fraudulent scheme, because

practical nursing cannot be taught without actual clinical training.

The possibility that a conviction could be secured on just such a basis was called to the attention of the Government and the trial court from the beginning. The defendants filed a pre-trial motion to limit the indictment to those paragraphs which alleged a scheme to misrepresent objective facts. (R. 1484). The Government resisted, and the court overruled the motion. (R. 1488-91). And the defense also objected to the charge on the ground that it would permit a conviction solely on the basis of the jury's judgment as to the value of a correspondence course in practical nursing. (R. 1390-91). This objection was overruled.

The jury's verdict, indeed, makes it clear that it accepted the opportunity thus offered by the Government. One of the defendants was Miss Lola Opal Christal. She was in charge of instruction at the school. She was in no way involved with the business or sales aspect of the school. Yet the jury convicted her. There is only one possible explanation for that verdict—and that is that the jury must have thought that anyone connected with a correspondence course which purports to teach practical nursing is automatically guilty of fraud. The court, of course, set aside the verdict against Miss Christal, but the fact that the jury found her guilty proves, although no proof is necessary, that the jury did not base its verdict on any evidence of misrepresentations of objective facts.

The case is almost as clear with respect to the defendant Adams, the sole individual petitioner here. Adams did not own the school, or participate in its profits. He was simply a paid employee, receiving a modest salary of $15,000 to $17,000. (R. 977) His pastor testified that he was an active church-goer with an unblemished reputation for honesty and integrity. (R. 1076-77) This testimony, and that of two other character witnesses (R. 133-37) was uncontradicted. Thus, the fact that the jury found him guilty is

also a strong indication that it accepted the Government's invitation to decide this case on the basis of the merit, or lack of merit, in a correspondence school of practical nursing.

The question thus squarely posed is not—we repeat, not —whether the jury's findings as to the value of a correspondence course are correct or supported by the evidence. This is not a proceeding to enjoin the operation of the school, or to deny it the use of the mails. This is a criminal conviction for wilful fraud. The question is whether, as a matter of law, such a conviction can be based on a jury's determination of a matter of opinion on which the experts disagree, and on which the defendants' view is supported by a decision of the Federal Trade Commission.

We are not, as the Government contends, asking this Court to review the sufficiency of the evidence. Rather, we are asking the Court to decide an important question of law, involving the interpretation of the mail fraud statute in the light of the constitutional requirement that criminal statutes specify with clarity the nature of the conduct which is prohibited and punishable. Our basic contention, as more fully stated in our petition, is that a criminal conviction of wilful fraud cannot rest on proof of representations of matters of opinion, which are supported by expert testimony and a decision of the Federal Trade Commission, even though there is also opinion to the contrary which a particular jury may find more plausible.

The various alleged misrepresentations of objective facts which the Government has reviewed in its brief at such length are thus not relevant at all to the basic issues in this case. We do wish to point out, nevertheless, that the Government's treatment of this aspect of the case is also less than a model of candor. By stating only part of the evidence, the government's brief creates the impression that the defendants were plainly guilty of making numerous misrepresentations of objective facts. In the appendix to this brief, we demonstrate that there was great conflict in

the evidence on this score, and that, considering the record as a whole, it is highly unlikely that the jury would have convicted the defendants on the basis of the evidence of such misrepresentations standing alone. We have omitted this argument from the body of this brief because we believe that, in the last analysis, it is both impossible and unnecessary to determine on what basis the jury convicted the defendants. What is important is that the indictment and the charge authorized a conviction on grounds which are so novel and questionable that they are deserving of review by this Court.

II. THE GOVERNMENT'S ARGUMENT THAT THE VERDICT IN THIS CASE IS CONSISTENT WITH APPLICABLE DECISIONS OF THE FEDERAL TRADE COMMISSION IS BASED ON A MISREADING OF THOSE DECISIONS.

One of the questions raised by the petition for certiorari is whether, as a matter of law, a conviction under the mail fraud statute can be based on conduct which the Federal Trade Commission has held not to constitute "unfair or deceptive acts or practices in commerce." It is our contention that the element of "wilfulness," which is an essential element of the crime of which the petitioners were convicted, cannot as a matter of law be found to exist in such circumstances. (See Petition for Certiorari, pp. 30-35)

In an effort to remove this fundamental issue from the case, the Government contends that the present convictions are consistent with the applicable decisions of the Federal Trade Commission, citing *National Institute of Practical Nursing*, 48 F.T.C. 1253; *Washington Institute of Practical Nursing*, 51 F.T.C. 301; *Wayne School Inc.*, 53 F.T.C. 428; and *Post Graduate Hospital School of Nursing, Inc.*, 53 F.T.C. 432. All of the decisions relied on by the Government, however, were rendered prior to the decision on which we relied in the petition for certiorari, *W. L. Schulze, T/A*

Chicago School of Nursing, 54 F.T.C. 1754, and with one exception *(National Institute of Practical Nursing)* they were not actually litigated, but involved only consent orders. Moreover, the *Schulze* case, in addition to being the Commission's latest decision concerning correspondence schools for practical nurses, is also its most definitive statement on the subject. In it, the Commission explains that the basis for its earlier decisions (cited here by the government) was that the schools involved in those cases had represented that their graduates would be qualified for state licenses. This finding, the Commission explained, "necessarily rendered most of the other representations [involved in those cases] false." On the other hand, the Commission explained, similar representations were found not to be false in the *Schulze* case because they were not accompanied by any misrepresentation concerning licensing. Thus, the Commission pointed out, "most of respondents' representations alleged in the complaint unquestionably would be false if respondent were representing their course as qualifying graduates to be licensed practical nurses." But, continued the Commission, the absence of any misrepresentation concerning licensing "in effect destroyed the basis for alleging most of the [respondent's other] representations to be false. While such representations would have been false if respondents had claimed that their course qualified graduates for licensure, it will be seen that in the absence of such a claim and proof of the contrary, such representations, with one exception, are in fact true and correct." 54 F.T.C. at 1759-60.

In an effort to distinguish the facts of this case from the facts of the *Schulze* case, the government refers to the fact that the respondents in *Schulze,* prior to the commencement of that case, began using the term "auxiliary nurse" instead of "practical nurse" in their promotional material. As the Commission's opinion makes clear, however, this was done to avoid confusion with the term "licensed practical nurse"

which is used in many state licensing statutes, including the one in Illinois where the school involved in *Schulze* was located. The School involved in the present case, however, is located in Texas, and the Texas law does not use the term "licensed practical nurse," but rather "licensed vocational nurse." The Commission itself recognized in *Schulze* that in a state such as Texas the term "practical nurse" would not be misleading:

> "Historically speaking, the term 'practical nurse' applied to one who was neither formally trained nor licensed, and was developed to distinguish this group from registered professional nurses. If the licensure laws had adopted a different term, such as is the case in Texas and California where they are called 'licensed vocational nurses,' some of the confusion in terminology would have been obviated." 54 F.T.C. at 1758.

It is thus crystal clear that the present convictions cannot be reconciled with the applicable decisions of the Federal Trade Commission, unless it is assumed that the jury's verdict rested on a finding that the defendants in this case—unlike the respondent in *Schulze* but like the respondents in the other FTC cases—represented that their course would qualify its graduates for a license. As we have seen, however, such an assumption simply cannot be made in the light of the indictment, the evidence, and the charge in this case. As we have demonstrated, the jury in this case was authorized to convict the defendants even if it found that they had not made any misrepresentations concerning licensure. In other words, the jury was authorized to find these defendants guilty of wilful fraud entirely on the basis of conduct which the FTC has held not to constitute an unfair or deceptive practice in commerce. Whether such a conviction is permissible under the statute, particularly in the light of the constitutional requirement that criminal statutes be clear

and specific, is a question of fundamental importance which is squarely raised by this case, and which should be decided by this Court.

Respectfully submitted,

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APPENDIX

IT IS HIGHLY UNLIKELY THAT PETITIONERS WOULD HAVE BEEN CONVICTED IF THE GOVERNMENT'S CASE HAD CONSISTED SOLELY OF THE KIND OF ALLEGED MISREPRESENTATIONS RELIED ON BY THE GOVERNMENT'S BRIEF.

As we have indicated in Part I of this reply brief, the Government's brief dwells entirely on that aspect of this case which involved allegations and evidence that the defendants had misrepresented certain objective facts. Although that part of the case is not really pertinent to the basic questions raised in the petition, we believe that the Court, in determining whether to grant certiorari, may wish to be informed as to how strong that part of the case really was. The Government's brief, of course, recites only the evidence most favorable to the prosecution. If the *whole* evidence is considered, a quite different picture emerges.

1. The Alleged Misrepresentations Concerning the Eligibility of Graduates of the Defendants' School for a State License.

The Government's brief states that some of the defendants' salesmen "left the impression with many students that graduation from the school meant that a person was a licensed nurse or could take the State examination to become one." (p. 5) It is true that the Government did produce a few former students who so testified, but their testimony did not fare too well. For example, one clearly admitted on cross examination that she did not understand the difference between a license and a diploma:

> "Q. Now, do you know the difference between a license and a diploma?
>
> "A. I didn't know at that time.
>
> "Q. All right. So Mr. Burns [a salesman] might have said license or might have said diploma and you didn't know the difference, isn't that right?

"A. Well, I just took it for license, like when a doctor practices and gets his license then he got the license.

"Q. You said you didn't know the difference between a license and a diploma, is that correct?

"A. I didn't know you had to go and get a license from the State of Texas. I learned it later, see." (R. 28)

Another witness was impeached by her own signed pretrial statement in which she had admitted that she understood the difference between an (unlicensed) practical nurse and a (licensed) vocational nurse when she signed up for the course, and that "I have found no reason to feel that anything was misrepresented to me." (R. 875-76) Still another admitted on cross-examination that all she remembers having been told by the salesman was that she would be "next to an L.V.N." (meaning Licensed Vocational Nurse), and that she understood that "next to" means "below an L.V.N." (R. 164-65).

Moreover, many of the former students called by the Government didn't even claim that they were told that the course would qualify them for a license, but testified only that they were not told anything about licensing one way or the other. (R. 46, 54, 58, 98, 145, 216).

But even if one or two salesmen had made misrepresentations concerning licensing, this plainly would not make the defendants in this case guilty of mail fraud, unless it were also shown that the defendants had somehow authorized or condoned such misrepresentations as part of a "scheme to defraud." On this question, the evidence showed that every salesman had been required to sign a contract of employment (Def. Ex. 33, Ex. Vol. 176) and a memorandum of instructions (Def. Ex. 34, Ex. Vol. 177) enjoining them to make no misrepresentations. Indeed, the memorandum

of instructions specifically contained the underscored directive:

"Do not promise licensure in any state."

The Government's brief states that "if a complaint was received from a student residing in a State which required all practical nurses to be licensed, White [the employee in charge of handling such correspondence] was instructed to be evasive in his reply." In support of this statement, the Government cites page 562 of the Record. Yet on that very page of the record, as well as on pages 563, 517, and 549, White, who was a Government witness, admitted that his practice was to inform all students from "mandatory" states that their state required all practical nurses to obtain a license, and that the course offered by the school would not qualify them for such a license. The form letter which White testified he was instructed to use for that purpose states:

> "The state of Louisiana offers a mandatory law which requires any person practicing Practical Nursing to obtain a license. Since our course of instruction will not qualify you for the examination your state offers, we feel that it is necessary to advise you of this fact before sending you your instructional material." (Def. Ex. 28, Ex. Vol. 168)

What could be less evasive?

The Government makes much in its brief of the experience of Lula May Robertson, the only student from a "mandatory" state who apparently took the course in a mistaken belief that it would qualify her for a license. On cross-examination, it appeared that this witness lived near the Texas border, and learned about the course as a result of reading the School's advertisement in a Texas newspaper. (R. 241) It was undisputed that the School did not advertise in Louisiana or any other state which required practical nurses

to be licensed, and that the School's policy was not to knowingly accept enrollments from such states unless the student was first specifically informed that the course would not qualify her for a license. (R. 1084) Adams' explanation that the isolated case of Mrs. Robertson was nothing more than an error (R. 1084) seems eminently reasonable, and must have seemed so to the jury, since it was the only one the Government was able to find. There is simply no basis for the Government's statement that the experience of Mrs. Robertson was "typical."

Finally, the record clearly establishes that no student could have been misled on this question of licensing any time after 1959. For in that year, the school revised its "Student Verification Questionnaire" by adding the following question:

> "Do you understand this course of training does not intend to qualify you as a licensed practical nurse, but is offered for its educational qualities?"

Every potential student was required to answer the questionnaire in writing. Nevertheless, the jury found a "scheme to defraud" which continued until 1962, the date covered by Count 18 of the indictment. This strongly indicates that the "scheme to defraud" found by the jury did not involve wilful misrepresentations by the defendants concerning licensing, since the record clearly shows that, at least since 1959, they made every possible effort to inform students of the facts in that regard.

2. The Alleged Misrepresentations Concerning the Employment Service Offered to Graduates of the School.

The Government's brief states that "another enticement was the offer of a free employment service, which guaranteed the graduate a job." (p. 5) It is true that the School offered to assist its graduates in finding employment. But the fact is that the School did provide such assistance. And

every student was informed, through the Student Verification Questionnaire (both prior to and after the 1959 revision) that "our placement service is not a guarantee of work." (Def. Ex. 47, Ex. Vol. 188; Def. Ex. 46, Ex. Vol. 186). The indictment did not even allege that the defendants guaranteed employment to anyone.

The Government's brief erroneously states that the placement service consisted of nothing more than "a form letter *issued to the students* who passed the course, praising her as industrious, dependable, and conscientious, and setting forth her 'scholastic average.'" (Brief in Opp. 7) The evidence shows, that these letters of recommendation were sent to potential employers, not simply issued to the students. (R. 523-24) In addition to sending such letters, the School placed classified advertisements in newspapers for graduates who were seeking employment.

It is true, as the Government states, that James White testified that he suggested certain improvements in the employment service, but his suggestion also involved charging an additional fee for this service. (R. 523-24) This suggestion was rejected by the President of the School, David Miller, because "he did not want the graduates to pay for employment." (R. 1062) White's testimony that Miller expressed disinterest in whether graduates obtained employment or not was flatly contradicted by Adams. (R. 1062)

3. The Alleged Misrepresentations Concerning the Nature of the Instruction Offered by the Defendants.

The Government's brief states that students "were told that they would receive hospital training" (p. 5) during the two-week training period offered at the end of the correspondence course, but in fact they "spent that time at the school practicing on dummy patients or viewing movies or lectures by milk salesmen" or touring the Dallas Health Museum, "a free public building." (p. 7)

The Government does not mention, in its brief, the un-

disputed fact that at one time actual clinical training at Dallas General Hospital was included in the two-week program, but was discontinued when the hospital entered a program for the training of licensed vocational nurses. At that time all references to hospital training was eliminated from the school's literature and sales materials. (R. 1080-81)

After that time, the two-week program consisted primarily of classroom training and practice, under the supervision of registered nurses. The students spent 40 hours per week in class, during which time almost all the skills covered by the correspondence portion of the course were demonstrated and practiced by the students, either on each other or on a dummy identical to one used in the training of professional registered nurses.* They practiced bedmaking (R. 835), taking of pulse, temperature and respiration (R. 836-37), bathing patients (R. 837), administration of enemas (R. 837-39), first aid (R. 839-40), administration of hypodermic shots (R. 841-43), taking blood pressure (R. 898), catheterization (R. 898), administration of insulin (R. 898-99), administration of oxygen (R. 900-901), etc. Occasionally, a physician would deliver a lecture (R. 333-34, 441-47), or a milk salesman would demonstrate the preparation of infant formulas. The tour of the Health Museum was led by one of the instructors, and served the purpose of acquainting the students with such things as the appearance of certain disease symptoms (illustrated at the museum by wax dummies), the various stages of pregnancy (illustrated by molds), surgical procedures (illustrated by huge pictures), etc. (R. 895-97)

Nothing in the indictment even alleges that the defendants misrepresented this aspect of their course, and there is no basis in the record for any finding that they did so.

* The deceptive nature of the Government's brief is illustrated by its disparging reference to these "dummy patients." The fact is that they are not mere toys, but specially constructed dummies, with all orifices, etc., and are used in all nursing schools throughout the country. Student nurses everywhere know them as "Mrs. Chase." (R. 838)

4. The Alleged Misrepresentations as to the Nature of the Employment Opportunities Available to Graduates of the Defendants' Course.

The indictment alleged that the defendants had falsely represented that its graduates "would be in demand for employment and would be readily employed in a skilled capacity as a nurse at a greater pay rate than nurse's aide, and earning up to $12 per day." (R. 1465) Echoing this allegation, the Government's brief states that "students were also told . . . that after graduation they could get jobs in any hospital." (Br. in Opp. 5) What the Government's brief neglects to mention, however, is that there is indisputable evidence in the record that graduates of the defendants' school did obtain employment in hospitals.

Dr. Jack Arthur Bergfeld, who operates the Comal Sanitarium and Hospital in New Braunfels, Texas, testified that graduates of the school had been employed by the hospital as practical nurses, that they had been competent, and that "I'll take any and all you can send me." (R. 932) In addition, a number of graduates of the school testified that they had found employment in Dallas Medical & Surgical Hospital, Baylor Hospital, Gaston Hospital, the Recovery Center, St. Paul's Hospital, Dallas Osteopathic Hospital, Methodist Hospital, Scottish Rite Hospital, Doctors' Hospital, North Houston Hospital, Lockwood Hospital, and others. (R. 779, 788, 852-53, 864, 881-82, 1041, 1137-38). These graduates all testified that they were entirely satisfied with the course, that it had adequately prepared them for their chosen occupation, and that they had no complaints.

It is true that a few graduates of the school, who testified for the prosecution, stated that they had not been successful in finding employment. But there is no basis for any finding that their experience was "typical" as the Government claims. There are some graduates of Harvard Law School who never find employment as lawyers, but that does not mean that the school is committing fraud when it claims to

offer a training course for lawyers. The fact is that innumerable graduates of the Texas School did obtain employment as practical nurses. That fact is established not only by the testimony summarized above, but also by the many testimonial letters received by the school and included in the material submitted to the Federal Trade Commission. (Def. Ex. 41, pp. 166-295) It is therefore inconceivable that the jury could have found that the defendants committed a fraud by representing that graduates of their course could obtain employment as practical nurses in hospitals or elsewhere.